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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 20040502-CA

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 WILLIAM JOSEPH IRELAND, : Case No. 20040502-CA
 :
 Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (2003), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Paul G. Maughan, Judge, presiding. Appellant is incarcerated.

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IN THE UTAH COURT OF APPEALS

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INTRODUCTION

Appellant/Defendant William Ireland relies on his opening brief and replies as follows. Matters not addressed in reply were adequately covered in Appellant's opening brief or do not merit reply.

ARGUMENT

**POINT. APPLYING AN OBJECTIVE TEST IN DETERMINING
WHETHER THE FACTS AMOUNT TO AN AGGRAVATED
ROBBERY ENSURES CONSISTENT APPLICATION OF THE
AGGRAVATED ROBBERY STATUTE.**

Applying an objective test in determining whether a defendant's actions give rise to a simple or an aggravated robbery ensures consistent application of the aggravated robbery statute. Contrary to the State's argument that an objective assessment of the facts would require a robbery victim to verify whether the robber actually possessed a gun, the objective approach allows the State to consistently define and prosecute the crime of aggravated robbery in only those circumstances where the objective facts give

rise to such a crime, regardless of the subjective belief of the victim. This approach is consistent with case law from other jurisdictions and, since the threat of harm involves a felony regardless of whether a gun is used, an objective review of the facts would not cause the dangers suggested by the State.

As outlined in Appellant's opening brief at 10-12, focusing on the actions of the defendant rather than the subjective response of the victim is consistent with State v. Suniville, 741 P.2d 961 (Utah 1987) as well as Williams v. Commonwealth, 721 S.W.2d 710, 712 (Ky. 1986), which the Utah Supreme Court relied on in Suniville. 741 P.2d at 965. The Supreme Court rejected the subjective analysis in Suniville, preferring instead to maintain the distinction between aggravated and simple robbery by employing an objective review of the evidence. Id.

Other courts have likewise eschewed a subjective analysis in drawing the line between simple and aggravated robbery. For example, in People v. Taylor, 628 N.W.2d 55 (Mich. App. 2001), the court rejected the notion that a victim's subjective belief controlled the determination of whether a robbery was aggravated, and instead considered the objective evidence. Id. at 59. The statute at issue in Taylor defined aggravated robbery as a robbery that occurs when "the defendant was 'armed with a dangerous weapon, or any article used or fashioned to lead the person so assaulted to reasonably believe it to be a dangerous weapon.'" Id., quoting MCL 750.529; MSA 28.797. Despite language in the statute indicating that a victim's belief that a robber was

armed elevated the crime, the Taylor court recognized that it had consistently focused on the objective evidence in determining whether a robbery was aggravated. Id., citing *inter alia* People v. Jolly, 502 N.W.2d 177 (Mich. 1993); People v. Banks, 563 N.W.2d 200 (Mich. 1997); People v. Saenz, 307 N.W.2d 675 (Mich. 1981); see also Faulkner v. State, 581 S.E.2d 365 (Ga. App. 2003) (applying objective review of the facts).

The approach employed by the court in Taylor and the lines drawn by the Michigan courts in determining whether a robbery is aggravated provide a workable and consistent approach for distinguishing between aggravated and simple robbery. For example, where the victim in Saenz thought the robber was armed, he did not see a weapon or item resembling a weapon, the court held that the facts did not show an aggravated robbery. Saenz, 307 N.W. 2d at 675-77. Likewise, in Banks, where the victim thought one of the robbers had a gun, but never saw anything resembling a gun, the defendant did not commit an aggravated robbery. Banks, 563 N.W.2d at 205. By contrast, in Jolly, where the victim saw a bulge in the defendant's vest and the accomplice told the victim that the robber had a gun, the court upheld a conviction for aggravated robbery because it was objectively reasonable to believe the robber had a gun under those circumstances. Jolly, 502 N.W.2d at 182. These cases demonstrate that for a robbery to be elevated to an aggravated robbery, the robber must use some object that would lead a victim to reasonably believe the robber is armed *and* make statements or threats that would further support an objectively reasonable assessment that the robber

has a weapon. See Jolly, 502 N.W.2d at 181-82; see also id. at 184 (Brickley, J., dissenting).

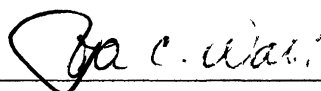
The facts in this case failed to establish that Ireland used an item that could reasonably be believed to a gun. Reinkoester testified that the hand in Ireland's pocket was held close to his body, but pointed toward Reinkoetser. R. 114:11. Reinkoester said the robber "gestur[ed] like there was a weapon, but it was more subtle." R. 114:12. The robber made no statements suggesting he had a weapon. R. 114:13, 23. Although the State claims that Ireland "tracked Reinkoester's movements and continued to point with the hand in his pocket (citing R. 114:12, 13, 21)," the portions of the record cited for that proposition do not show that Ireland continued to point with his hand while tracking Reinkoester. Instead, the testimony shows that while Reinkoester was at the desk, he could not see the hand in the coat because the desk was too high. R. 114:14. Under these circumstances, even if the evidence were stretched to conclude that the subtle gestures were an item, the remainder of the evidence failed to rise to a level demonstrating an objectively reasonable belief that Appellant was armed with a gun.¹ Accordingly, this case involved a simple robbery and the lower court's ruling should be reversed.

¹ Under the weapons part of Title 76, a dangerous weapon is defined as "any item that in the manner of its use or intended use is capable of causing death" Utah Code Ann. § 76-10-502 (3003). Pursuant to this definition and under the circumstances of this case, it was not objectively reasonable to believe that Appellant was armed with a gun.

CONCLUSION

Appellant/ Defendant William Ireland respectfully requests that the order of the trial court denying his motion to reduce the charge to a second degree felony be reversed and the matter remanded to the trial court to allow him to withdraw his conditional plea.

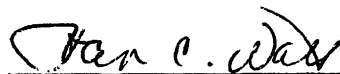
SUBMITTED this 2nd day of February, 2005.



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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 2nd day of February, 2005.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of February, 2005.